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LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Ave.
MC 65-41
Indianapolis, Indiana 46204-2251

Subject: Comments on LSA Document #08-764, Second Notice of Comment Period

Dear Ms. Stevens:

The Indiana Water Quality Coalition and the Indiana Manufacturers Association submit the following comments and suggestions to the "Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures," LSA Document #08-764, 20091216-IR-32708764SNA (hereinafter, the "Antidegradation Rules"). The Indiana Water Quality Coalition ("IWQC") is a group of businesses with shared interests in Indiana regulations, policies, and operating procedures concerning water quality. The Indiana Manufacturing Association ("IMA") is a voluntary, non-profit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs. Each of these entities (collectively, the "IWQC and IMA") has members or facilities in Indiana that will be considerably impacted by the adoption of rules concerning antidegradation standards and implementation procedures.

The Antidegradation Rules contain a number of revisions to the current Indiana water quality standards rules. Some of these revisions will result in significant changes in facility operations, and cause severe restrictions to or even prohibit new and increased discharges that will have minimal impact on water quality. These changes will impose additional compliance costs, and could adversely impact economic growth and employment in the State. Despite these significant impacts, we believe that there

will be little environmental benefit from some of the new requirements. Therefore, we urge IDEM and the Board to consider, for each proposed regulatory change, whether the change is truly necessary and whether its benefits justify the resulting social and economic impacts.

The comments and suggestions below highlight issues particularly important to the IWQC and IMA. If you have any questions or need additional information on any issue raised in the comment, please contact me by email (wwagner@taftlaw.com) or by phone (317) 713-3614.

I. INTRODUCTION

The IWQC and IMA have actively participated in IDEM's antidegradation rulemaking activities since they began in the late 1990s, following the adoption of the Great Lakes system rules. The IWQC and IMA submitted detailed comments on IDEM's March 2003 first notice of rulemaking, March 2005 second notice of rulemaking, and October 2008 first notice of rulemaking. These past submissions provide a complete description of our positions on each aspect of antidegradation review. New and detailed comments are set forth below based on the proposed rules published on December 16, 2009 in the *Indiana Register.*

II. COMMENTS CONCERNING IDEM'S ANTIDEGRADATION RULES

1. The Antidegradation Rules Should Be Simplified.

The Antidegradation Rules should be simplified in the ways, and for the reasons, set forth below. These rules must be re-drafted with the following goals in mind:

(1) Minimize the expenses to regulated entities required to comply with the rules;
(2) Achieve the regulatory goal in the least restrictive manner;
(3) Avoid duplicating standards found in state or federal laws;
(4) Improve ease of comprehension; and
(5) Have practical enforcement.

See I.C. § 13-18-3-2(a) (requiring compliance with I.C. § 4-22-2-19.5).[1/]

As demonstrated below, IDEM's Antidegradation Rules have become very complex and unwieldy. The rules appear to apply to anyone, when the rules were

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1/ Even though there is a requirement to have antidegradation rules in place by federal law, the rules at I.C. § 4-22-2-19.5 apply to this rulemaking because the federal language to adopt an antidegradation policy is not prescriptive of the specific rule requirements that states must adopt to meet the federal requirements. *See* 40 CFR 131.12(a).

originally intended to apply to NPDES Permittees[2/] and any state-regulated nonpoint source discharges. The rules also appear to apply to any discharge of anything, when the rules were originally intended to apply to a more limited subset of sufficient parameters that could impact designated uses. By incorporating broad terms (such as Indiana's definition of "pollutant") and requiring detailed calculations for substances that have no water quality standards, the rules have become a quagmire and require the expenditure of substantial time, money, and energy to achieve compliance. The agency and private parties have limited resources. Administrative necessity requires a more focused set of antidegradation rules, especially when the benefits of such detailed regulation become more and more marginalized.

2. The Antidegradation Rules Should Only Apply to NPDES Permittees.

The Antidegradation Rules should apply only to a person required to have a NPDES permit. As written, the Antidegradation Rules apply to anyone who would discharge anything to any surface water within or adjacent to Indiana's borders. The net cast by these rules could ensnare, for example, a person washing a car in their driveway who allows the runoff water to flow into any surface water falling within the broad definition.[3/] This is well beyond the scope of the federal antidegradation rules and would lead to absurd results and be administratively unfeasible for IDEM to enforce.

Under the Clean Water Act, EPA may only require States to adopt and implement the federal antidegradation policy against point source discharges. *American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1164-65 (D. Colo. 2002) ("Congress has left the regulation of nonpoint sources up to the states."), *aff'd* 260 F.3d 1192, 1198 (10th Cir. 2001) ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonsource pollution."). These point source discharges are subject to NPDES permit requirements, represent a significant source of discharges into surface waters of the state, and are a finite source of persons to be regulated. Despite the broad language of 40 CFR § 131.12(a)(2), which states that States "shall assure that there shall be achieved ... all cost-effective and reasonable best management practices for nonpoint source control," States are not required to regulate nonpoint source discharges. *American Wildlands*, 260 F.3d at 1198; EPA Water Quality Handbook, Ch. 4, Section 4.5 ("Section 40 CFR 131.12(a)(2) does not require that States adopt or implement best management practices for nonpoint sources prior to allowing point source degradation of a high quality water. However, States that have adopted nonpoint source controls must assure that such controls are properly implemented before authorization is granted to allow point source degradation of water

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2/ "NPDES Permittees" refers to those persons required to apply for a National Pollutant Discharge Elimination System ("NPDES") permit under 327 IAC 5-2-2.

3/ "Surface water" is defined at 327 IAC 5-1.5-72, which incorporates the very broad definition set forth in I.C. § 13-11-2-265.

quality.").[4/] Rather than trying to regulate any discharge, IDEM should focus its antidegradation efforts and limited resources on dischargers who are already subject to NDPES permit regulations.

In addition to the fact that EPA cannot enforce the federal antidegradation policy against nonpoint sources or require IDEM to enforce the policy against non-regulated nonpoint sources, the Antidegradation Rules may also be subject to an attack for failing to provide procedural due process as required by the 14th Amendment to the U.S. Constitution and Article 1, Section 12 of the Indiana Constitution. *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007); *Healthscript, Inc. v. State*, 770 N.E.2d 810, 815-816 (Ind. 2002). Under these cases, a statute can be declared void for failing to provide adequate due process where the prohibited conduct is too vague, fails to provide "fair warning" of what exactly is prohibited, and may result in discretionary enforcement.

Further, IDEM may exclude nonpoint source discharges from the Antidegradation Rules under the doctrines of "absurd results" and "administrative necessity." Some have argued that the federal antidegradation regulations broadly prohibit any new or increased discharge of anything to surface waters of the state, including unregulated nutrients and sediments,[5/] so that IDEM cannot limit its enforcement of antidegradation to certain pollutants. Such thinking is contrary to the federal antidegradation regulations, which allow States to prioritize the pollutants subject to antidegradation review. *See* 40 CFR § 131.11(a)(1), which provides that "States must adopt those water quality criteria that protect designated use. Such criteria must be based on sound scientific rationale and must contain *sufficient parameters or constituents* to protect the designated use." (Emphasis added.) Clearly, IDEM does not need to try to regulate every possible substance that could be introduced into a surface water, which appears to be what IDEM has tried to do by including calculations for pollutants without water quality standards and using the broadly-defined terms of "toxic substances"[6/] and "pollutants."[7/]

4/ *See also* EPA Water Quality Handbook, Ch. 4.6 ("There is a direct Federal implementation mechanism to regulate point sources of pollution but no parallel Federal regulatory process for nonpoint sources."); Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID) (hereinafter, "SID"), EPA 1995, p. 205, Ch. VII (A)(1) ("The applicability of antidegradation to nonpoint sources is also a source of confusion. ... Neither the antidegradation provisions contained in the final Guidance, nor existing regulations, confer any additional authority upon States, Tribes or EPA to regulate nonpoint sources of pollution."

5/ Petition for Corrective Action or Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Indiana (hereinafter, "Petition for Corrective Action"), by the Hoosier Environmental Council, the Hoosier Chapter of the Sierra Club, and the Environmental & Policy Center of the Midwest to U.S. EPA Administrator Lisa Jackson, dated December 17, 2009, pp. 5-6.

6/ Antidegradation Rules, p. 29, 327 IAC 2-1.3-2(61) ("Toxic substances means substances that are or *may become* harmful to: aquatic life, humans, other animals, plants, or food chains when present in sufficient concentrations or combinations. The term includes those substances identified as toxic under Section 307(a) of the CWA.")(Emphasis added).

Not only do the federal antidegradation regulations not say what certain groups believe it to say, but as the U.S. Supreme Court has explained, the plain meaning of a statutory provision is not conclusive; i.e., "in the 'rare case' [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters . . . the intentions of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). As EPA recently explained in connection with its proposed Greenhouse Gas Tailoring Rule to limit the number of greenhouse gas emitters who must obtain new permits:

> The D.C. Circuit, in surveying the doctrine [of absurd results] over more than a century of jurisprudence, characterized the body of law in absolute numbers as comprising "legions of court decisions." *In re Franklyn C. Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991). The U.S. Supreme Court cases include, among others, *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132-133 (2004)("any entity" includes private but not public entities); ... *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976) (prohibition in Federal Water Pollution Control Act against discharging into navigable waters "pollutants," which are defined to include "radioactive materials," does not apply to three specific types of radioactive materials"; *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) (statutory construction is not confined to the "bare words of the statute"); *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946)("literalness may strangle meaning")....
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> The D.C. Circuit has also had several decisions apply the absurd results doctrine to avoid a literal interpretation or application of statutory provisions. *See* ... *Environmental Defense Fund v. EPA*, 82 F.3d 451, 468-469 (D.C. Cir. 1996)(although Clean Air Act requires that a Federal action conform to the State implementation plan that is currently in place, EPA may instead require conformity to a revised implementation plan that State Commits to develop; "[t]his is one of those rare cases ... [that] requires a more flexible, purpose-oriented interpretation if we are to avoid 'absurd or futile results.'")....

7/ Antidegradation Rules, p. 27, 327 IAC 2-1.3-1(42).

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55292, 55306-55307 (Oct. 27, 2009).

Drafting antidegradation rules so broadly as to apply to anyone who discharges anything to any surface water of the state would lead to absurd results. The number of people who would call or apply to IDEM for determinations under the Antidegradation Rules could be staggering. In times of limited budgets, limited administrative resources, and limited private resources, IDEM should not want to be inundated with questions and determinations related to trivial discharges, where the federal antidegradation regulations are truly aimed at significant sources of increased loading of regulated pollutants to high quality waters.

Significantly, the antidegradation rules of the Great Lakes system[8/] and several states (Illinois, Michigan, and Minnesota) have limited the scope of their antidegradation programs to NPDES permittees only. And, each of these programs has been approved by EPA Region 5.

For these reasons, the IWQC and IMA suggest that IDEM specifically limit the Antidegradation Rules to NPDES permittees. To do so, we suggest that the following phrase be added to the end of 327 IAC 2-1.3-1(b), "... by any person required to have a National Pollutant Discharge Elimination System ("NPDES") permit pursuant to 327 IAC 5-2-2."

3. The Antidegradation Rules Should Focus on Regulated Pollutants Rather Than Undefined "Toxic Substances" and "Pollutants of Concern."

The Antidegradation Rules should be simplified to clearly and explicitly explain which substances are subject to the regulations. Contrary to what some may believe, IDEM does not have to anticipate and regulate every possible substance that could be introduced into a surface water of the state under the antidegradation regulations. The federal antidegradation regulations are clear that "States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain *sufficient parameters or constituents* to protect the designated use." 40 CFR § 131.11(a) (emphasis added). There is no requirement to include every possible parameter or constituent. Further, "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. *When criteria are met, water quality will generally protect the designated use*." 40 CFR § 131.3(b). Accordingly, there is no mandate that IDEM try to include every possible parameter that exists. Again, the state and private parties (who are required under the proposed rules to calculate criteria for substances that may have no water quality standards) have

8/ 327 IAC 2-1.5-4.

limited resources, limited administrative capacity, and in some cases limited expertise to make these determinations. Instead of a regulatory scheme that defines toxic substances and pollutants as encompassing anything and everything, the definitions should be narrowed and simplified as explained below. This would meet the rulemaking requirements under I.C. § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, avoiding duplication of existing standards in other state and federal laws, imposing ease of comprehension, and allowing for practical enforcement.

A. "Toxic substances" should be narrowed to mean those toxic substances specifically regulated by IDEM.

Constitutional due process requires "fair notice" of the prohibited conduct, which in turn provides for ease of comprehension and practical enforcement.[9/] Pursuant to fair notice, the term "toxic substances" should be narrowed to mean those toxic substances identified as toxic under Section 307(a)(1) of the Clean Water Act rather than simply "substances that ... may become harmful to aquatic life, humans, other animals, plants, or food chains."[10/] This would be consistent with the federal antidegradation regulations, which similarly identify "toxic pollutants" as "those pollutants listed by the Administrator under section 307(a) of the Act." 40 CFR § 131.3(d). In the Sixteenth Century, Paracelcius coined the phrase "the dose makes the poison," which implies that all chemical agents are intrinsically toxic and whether they cause harm is only a question of dose.[11/] The term "toxic substances" as defined may be invalidated on vagueness grounds because it does not provide fair notice of which substances are "toxic substances" governed by the Antidegradation Rules. Industry must be able to ascertain which substances are subject to the antidegradation rules. Accordingly, 327 IAC 2-1.3-2(60), which defines "toxic substances," should be amended so that toxic substances is defined as "those substances identified as toxic under Section 307(a)(1) of the Clean Water Act."

B. "Pollutant of concern" should be defined as a toxic substance under Section 307(a)(1) of the Clean Water Act which has an applicable water quality criterion.

IDEM defined "pollutant of concern" to mean "a pollutant that is reasonably expected to be present in: (A) a discharge based on the source and nature of the discharge; and (B) the receiving water in sufficient amounts to have a potentially detrimental affect on the designated or existing uses of the receiving water."[12/] Many

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9/ *Healthscript, Inc. v. State*, 770 N.E.2d 810, 815-816 (Ind. 2002).

10/ Antidegradation Rules, p. 29, 327 IAC 2-1.3-2(61).

11/ Bernard D. Goldstein and Mary Sue Henifin, *Reference Guide on Toxicology*, Reference Manual on Scientific Evidence, Second Edition, p. 403 (2000).

12/ Antidegradation Rules, p. 27, 327 IAC 2-13-2(43).

have suggested that this definition should be revised so that the permittees know exactly which parameters are "pollutants of concern" because the definition of a "pollutant of concern" as simply meaning a "pollutant" is unconstitutionally vague, fails to provide fair notice of which substances were prohibited, and could lead to arbitrary and capricious enforcement.[13/] We propose that the term "pollutant of concern" be defined as "a pollutant that is identified as a toxic under Section 307(a)(1) of the Clean Water Act that has an applicable water quality criterion and that is reasonably expected to be present in: (A) a discharge based on the source and nature of the discharge; and (B) the receiving water in sufficient amounts to have a potentially detrimental effect on the designated or existing uses of the receiving water." This modification would achieve the regulatory purpose in a less restrictive manner and be easily understood by IDEM and the regulated community.

As a further example, Ohio's antidegradation rules define a "regulated pollutant" as meaning "any parameter for which water quality criteria have been adopted in, or developed pursuant to, Chapter 3745-1 of the Administrative Code, with the exception of biological criteria, and any other parameter limited in a national pollutant discharge elimination system permit as a result of new source performance standards, best conventional pollutant control technology, best available technology economically achievable or best practical control technology currently available for the appropriate categorical guidelines of 40 C.F.R." See Ohio Admin. Rule 3745-1-05(A)(21), (2001). Indiana could consider adopting a similar provision.

In conclusion, narrowing the scope of the Antidegradation Rules to specifically identified regulated pollutants would achieve compliance with the goals of I.C. § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rule, achieving the regulatory goal in a less restrictive manner, avoiding duplicate standards found in other state and federal laws[14/], improving ease of comprehension, and allowing for practical enforcement. And, IDEM would not have the administrative burden of reviewing the regulated community's work and independently calculating criteria for substances that have no water quality standards.

13/ In addition to the prohibitions identified as unconstitutional in *Brown* and *Healthscript* (*see supra*, p. 4, Section 2), the Indiana Supreme Court and other Indiana courts have repeatedly and uniformly rejected pollution exclusions in insurance policies as ambiguous and unenforceable for well over a decade. *See, e.g., American States Ins. Co. v. Kiger,* 662 N.E.2d 945, 947-49 (Ind. 1996); *Seymour Mfg. Co. v. Commercial Union Ins. Co.,* 665 N.E.2d 891, 892 (Ind. 1996); *Freidline v. Shelby Ins. Co.,* 774 N.E.2d 37, 40 (Ind. 2002), *summarily affirming* 739 N.E.2d 178, 184 (Ind. Ct. App. 2000); *The Travelers Indem. Co. v. Summit Corp. of America,* 715 N.E.2d 926, 934-35 (Ind. Ct. App. 1999); *Governmental Interins. Exchange v. City of Angola,* 8 F.Supp.2d 1120, 1128 (N.D. Ind. 1998).

14/ Many other Indiana laws generally prohibit discharging contaminants into the environment, both civil (I.C. § 13-30-2-1) and criminal (I.C. § 13-30-10-1.5), and NPDES permittees are required to provide notice of certain new or increased discharges of toxic pollutants (327 IAC 5-2-9).

4. Best Available Demonstrated Control Technology Should Be Adequately Demonstrated, Reasonably Available, and Applicable to the Permitted Facility.

Best available demonstrated control technology or "BADCT"[15/] should mean the highest statutory and regulatory requirements for point sources, including applicable new source performance standards and best management practices for nonpoint source pollutant controls, either of which have been *adequately demonstrated* and which are *reasonably available* to the discharger (similar to limitations existing under the Great Lakes System and Michigan and Ohio law), and which are otherwise *applicable* to the permitted facility as defined by the existing regulatory program. The laundry list of highest statutory and regulatory requirements appearing at 327 IAC 2-1.3-2(3)(C) only serves as fodder for lawsuits. If the requirements are neither adequately demonstrated nor reasonably available, they should not be considered the best available demonstrated technology.

Further, the IWQC and IMA are concerned that the highest statutory and regulatory requirements must be applicable to the permitted facility at issue. This may be an otherwise obvious point, but certain groups have argued in the past for the application of requirements for a different industrial source category standard than that applicable to a particular permitted facility; e.g., applying standards for the aluminum industry to resins. Thus, the Antidegradation Rules should be re-written for clarity, to provide certainty to the regulated community that it will not be held to unachievable aspirational standards, and to remove unnecessary additional administrative burden from IDEM.

5. The *De Minimis* Test Should Be at Least as Favorable as Wisconsin's, Which is EPA Approved.

The Antidegradation Rules do not achieve the regulatory goal in the least restrictive manner. EPA adopted the *de minimis* test because it "recognize[d] that certain activities, although they may result in some lowering of water quality, will not lower water quality to such an extent as to result in a significant lowering of water quality. EPA's goal in allowing States ... to identify certain increases as *de minimis* was to provide a means of *reducing the administrative burden on all parties associated with activities of little or no consequence to the environment.*"[16/] This in turn allows states to focus their resources where they may result in the greatest environmental protection.[17/] "EPA has afforded the states ... some discretion in determining what constitutes a

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15/ Antidegradation Rules, p. 23, 327 IAC 2-1.3-2(3).

16/ SID, p. 208, Ch. VII (C)(2)(a)(i) (emphasis added).

17/ Memorandum regarding Tier 2 Antidegradation Reviews and Significant Thresholds, Ephraim S. King, Director Office of Science and Technology, EPA, (August 10, 2005) (hereinafter, the "King Memo"), p. 2.

significant lowering of water quality. ... Relying upon input offered during a four-year open public process involving environmental groups, industry representatives, and other experts, with numerous opportunities for public input, the directors of the eight Great Lake states and EPA technical experts reached a consensus on a significance threshold value of ten percent (10%) of the available assimilative capacity, coupled with a cumulative cap."[18/] To that end, EPA's scientists "identified three criteria to be used in classifying an increased loading as de minimis: ... (1) only non-bioaccumulative chemicals of concern [("non-BCC")] will be released as a result of the proposed activity responsible for the anticipated lowering of water quality; (2) the proposed lowering of water quality uses less than 10 percent of the available assimilative capacity; and (3) for [priority pollutants] included in 40 CFR 132.2, Table 5, at least ten percent of the total assimilative capacity remains unused following lowering of water quality."[19/]

Notwithstanding the Great Lakes System 10% *de minimis* test, EPA has approved Wisconsin's *de minimis* test, which is more easily understood by regulators and the regulated community and achieves its purpose in a way that minimizes the expense to the regulated entities required to comply with the rule. Wisconsin's *de minimis* test provides that degradation is considered significant and subject to antidegradation review if the proposed new or increased discharge, along with all other new or increased discharges, taking into account any changes in assimilative capacity over time, *results in an expected level greater than one-third of the assimilative capacity for any indicator parameter other than dissolved oxygen.*[20/]

IDEM's Antidegradation Rules, by comparison, are more limited. Degradation is considered *de minimis* for a high quality water that is not an outstanding state resource water where the proposed net increase in the loading of a pollutant of concern is less than or equal to 10% of the existing unused loading capacity for Tier 1 and 20% of the existing unused loading capacity for Tier 2.[21/] Further, the benchmark unused loading capacity is 75% of the unused loading capacity established at the time of the permit issuance.[22/] Degradation is considered *de minimis* for a high quality water that is an outstanding state resource water outside the Great Lakes basin of a non-BCC toxic substance, where the proposed net increase in the loading greater than 1% of the existing unused loading capacity for Tier 1 or 2% of the unused loading capacity for Tier 2, where the benchmark unused loading capacity is 97.5% of the unused loading capacity established at the time of the permit issuance.[23/] The IWQC and IMA's

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18/ King Memo, p. 2.

19/ SID, p. 207, Ch. VII (C)(2)(a)(i).

20/ NR 207.05(4).

21/ Antidegradation Rules, pp. 32-33. 327 IAC 2-1.3-4(b)(1)(A)(i).

22/ Antidegradation Rules, p. 32, 327 IAC 2-1.3-4(b)(1)(A)(i)(DD).

23/ Antidegradation Rules, p. 32, 327 IAC 2-1.3-4(b)(1)(B).

preferred *de minimis* test would be that of Wisconsin for high quality waters that are not outstanding resource waters, which EPA Region 5 has approved.

In addition, the 10% threshold was originally established with the intent of protecting the Great Lakes. Therefore, 10% should be the starting point for the OSRW designation in Indiana and the other so designated high quality waters should have a de minimis threshold that is significantly higher like Wisconsin.

In a recent Petition for Corrective Action, some have argued that allowing for *de minimis* discharges might not be appropriate at all.[24/] This position is clearly belied by the Supreme Court and D.C. Circuit Court opinions (*supra*, pp. 4-6, Section 2) concerning the doctrines of "absurd results" and "administrative necessity." The federal antidegradation regulations only require the State to adopt water quality criteria containing "sufficient parameters or constituents to protect designated uses." 40 CFR § 131.11(a)(1). "When these criteria are met, water quality will generally protect the designated use." 40 CFR § 131.3(b).

6. The Demonstration Requirement for Exemptions to Antidegradation Should Be Eliminated.

The requirement to submit demonstration information for exemptions under 327 IAC 2-1.3-4(b)(3) should be eliminated. IDEM's antidegradation demonstration does not achieve the regulatory goal in the least restrictive manner. Activities requiring the submission of an antidegradation demonstration are identified at 327 IAC 2-1.3-4(b)(3)(A) - (F)[25/], which require an antidegradation demonstration complying with 327 IAC 2-1.3-6, and 327 IAC 2-1.3-4(b)(4)(A) - (D), which require the submission of an exemption justification according to 327 IAC 2-1.3-5. The antidegradation demonstration application at 327 IAC 2-1.3-6 is very onerous.[26/]

Antidegradation demonstrations should permit IDEM to fairly quickly determine whether or not the action proposed by the discharger that will result in a significant lowering of water quality is both necessary and will support important social and economic development.[27/] By comparison, the Great Lakes Water Quality Antidegradation Policy antidegradation demonstration seeks limited information:

24/ Petition for Corrective Action, p. 7.

25/ Antidegradation Rules, pp. 33-34.

26/ For example, if a person remediates VOC-impacted groundwater, the remediated water must meet the 5 ppb maximum contaminant level similarly required under the Safe Drinking Water Act. Water that is otherwise safe by regulatory drinking water standards should not have to undergo an antidegradation exemption demonstration.

27/ SID, p. 203-204, Ch. VII (A)(1).

(1) An analysis of cost-effective pollution prevention alternatives and techniques available to the entity to eliminate or significantly reduce the extent to which the increased loading results in a lowering of water quality;
(2) An analysis of alternative or enhanced treatment techniques available;
(3) An analysis of important social or economic development and benefits foregone if the lowering of water quality is not allowed; and
(4) Making special provision for remedial actions under CERCLA, RCRA, and similar actions pursuant to Federal or State law.[28/]

In response to public comments that more detailed guidance was needed on all aspects of the demonstration, EPA responded that it "was convinced that it is not possible to write guidance that would cover adequately every possible situation. In addition, including greater detail would hinder efforts by ... States to adapt the final Guidance to existing regulatory structures and thereby slow its ability to respond to requests to lower water quality."[29/] No other state in Region 5 requires such onerous demonstration requirements.

EPA's final Guidance requires dischargers to identify "cost-effective" pollution prevention alternatives to eliminate or greatly reduce the extent of significant lowering of water quality.[30/] To that end, EPA agreed to use a ten percent (10%) additional cost benchmark as guidance as the easiest measure of affordability to implement available treatment options.[31/] IDEM's proposed Antidegradation Rules contain no similar ten percent (10%) additional cost benchmark threshold to identify cost-effective pollution prevention alternatives.[32/] Accordingly, simplifying this process and following EPA's guide of "using a ten percent increase in treatment costs as a benchmark for determining whether or not alternative or enhanced treatment options identified through this analysis were affordable."[33/] Allowing for a benchmark guide of 10% additional cost to determine cost-effective pollution prevention alternatives would meet the rulemaking requirements under I.C. § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, avoiding duplication of existing standards in other state and federal laws, improving ease of comprehension, and allowing for practical enforcement.

28/ Appendix E to 40 CFR 132, Great Lakes Water Quality Initiative Antidegradation Policy, III. Antidegradation Demonstration.

29/ SID, pp. 219-220.

30/ SID, p. 220.

31/ SID, p. 220.

32/ Antidegradation Rules, p. 35, 327 IAC 2-1.3-6(b)(11) examines "the cost of the water pollution controls associated with the proposed activity, and (b)(12) examines "the availability, reliability, cost-effectiveness, and technical feasibility of ... degradation mitigation techniques and alternatives."

33/ SID, p. 223.

7. The Public Notice Provisions Are Onerous and Unnecessary.

The antidegradation public participation requirement may be satisfied by providing public notice and the opportunity for the public to request a hearing. The IWQC and IMA request that 327 IAC 2-1.3-7(b)(3)[34/] be deleted from the Antidegradation Rules. The IWQC and IMA believe that IDEM notifying the public of an antidegradation demonstration being received from an applicant is sufficient. Applicants should not have to hold a public meeting prior to submitting an application. The SID states as follows:

> Opportunity for public comment is an essential element of the antidegradation decision making process and is required under Federal regulations at 40 CFR 131.12. If the tentative decision relates to an activity subject to a NPDES permit, the public participation requirements may be fulfilled by the public notice of the draft permit and fact sheet. In any event, the public notice of the tentative decision must either set forth the extent to which water quality will be significantly lowered and the basis for the tentative decision to allow the lowering, or, if analysis of the demonstration has been deferred, a tentative decision to deny the request to lower water quality pending public comment and analysis of the information obtained through antidegradation demonstration.[35/]

While public participation is required under 40 CFR 131.12(a)(2), there is no mandate from federal law imposing public meetings.[36/] IDEM can fulfill its public consultation obligation by meeting with advisory groups, as it has thus far.[37/] Additionally, public meetings are not similarly required for the issuance of an NPDES permit.

If IDEM is going to require a public meeting process, it should at least have requirements similar to those already existing for other programs. The Antidegradation Rules do not even require that the 25 persons be adults or sign their request for a public meeting.[38/] Additionally, the Antidegradation Rules require a regulated entity to hold a

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34/ Antidegradation Rules, p. 38.

35/ SID, p. 225.

36/ *See* 40 CFR 25, Public Participation In Programs Under The Resource Conservation and Recovery Act, The Safe Drinking Water Act, And The Clean Water Act.

37/ 40 CFR 25.4.

38/ As a comparison, the public hearing requirements for a solid waste disposal facility requires the filing of a petition signed by one hundred (100) adult individuals who reside in the county affected

public meeting before submitting its application to IDEM, which is nonsensical and not required by any other state that has adopted an antidegradation rule.[39/] In fact, public hearings have traditionally been held only after an application for a permit has been issued and received preliminary approval by IDEM. Holding a hearing before even submitting an application makes no sense and will only adds to the administrative burden and expense and lead to possible confusion to the public. Accordingly, the public meeting provisions do not meet the rulemaking requirements under I.C. § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, and avoiding duplication of existing standards in other state and federal laws.

8. The Antidegradation Rules Fail to Appropriately Consider the Fiscal Impact of the Proposed Rules.

The IWQC and IMA have estimated the requirement to hold public meetings will annually cost dischargers between $77,224 and $165,480. For the past five calendar years, 2009 inclusive, IDEM has received, on average, 49 new NPDES applications each year with actual numbers ranging from a low of 38 to a high of 60.[40/] IDEM has received, on average, 56 modification requests annually.[41/] This most likely means that the annual estimate of public meetings to be held by existing discharge permit holders seeking modifications or new applicants could range from a low of 49 (assuming all new permits alone required a public meeting) to a high of 105 (assuming all new permits and permit modifications required a public meeting. Below is a table containing the annual cost estimates for a permitee to development limits and hold a public meeting. This table does not include any additional costs for unused loading capacity calculation costs. Added annual costs to process a technology-based and water quality-based limit for a single pollutant will increase the annual program costs from $176,253 to $377,685. The table below most likely significantly under-estimates costs as many activities *de minimis* activities are not included in these calculations.

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or own real property within one mile of the site of the proposed or existing facility. *See* I.C. § 13-15-3-3(b).

39/ Antidegradation Rules, p. 38, 327 IAC 2-1.3-7(b)(3).

40/ Antidegradation Rules, p. 2.

41/ Antidegradation Rules, p. 2.

Activity	Frequency	Cost Estimates (1990 dollars) Low	Average	High	Estimated average annual costs for 49 permits	Estimated high average annual costs for 105 permits
Develop a technology mass-based permit limit at a previously unpermitted facility assuming technology has been preselected[42/]	1 time	$327	$917	$1,497	$44,933	$96,285
Provide technical guidance on a set technology based limit[43/]	1 time	$38	$187	$337	$9,163	$19,635
Develop and draft water quality based effluent limits	1 time	$327	$917	$1497	$44,933	$96,285
Conduct a public meeting	1 time	$1,123	$1,576	$1,871	$77,224	$165,480
Total					$176,253	$377,685

The Proposed Rule would have substantial adverse social and economic impacts, due to requirements that have no sound scientific basis. Moreover, the scope of the antidegradation rules is overly broad, and the antidegradation review process requires IDEM to make determinations concerning complicated social and economic

42/ Administrative Cost Components and Frequency per Facility, Actual cost values provided by U.S. EPA Office of Water, ECONOMIC ANALYSIS OFFINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PHARMACEUTICAL MANUFACTURING INDUSTRY SECTION TEN. COST AND BENEFITS OF THE FINAL PHARMACEUTICAL INDUSTRY EFFLUENT GUIDELINES AND MACT STANDARDS RULE, Table 10-2.

43/ Providing technical guidance on a set technology-based limit, developing and drafting water-quality based effluent limits, and conducting a public meeting are estimated to be equivalent to issuing a technology based limit. This value is likely to be low in that water quality modeling usually takes longer. This is presumed to be a low, conservative estimate.

factors, for which the agency is ill-equipped. As a result, implementation of the Antidegradation Rules has the potential to create substantial additional delays in the processing of permit applications and requests for permit modifications.

Antidegradation review can be time-consuming and expensive. Such review also can introduce a substantial element of uncertainty into business planning and trying to predict what will be the outcome. Therefore, the Antidegradation Rules should also contain (1) an applicability provision that uses a bright line trigger that necessitates a new or increased permit limits; and (2) a provision pertaining to the time for IDEM's rejection or approval of exemption applications. The regulated community should be informed as quickly as possible whether IDEM accepts or rejects an exemption application, and need the certainty of knowing that there is a clear time period by which they can expect such a determination.

In addition, it is possible that those in the regulated community may encounter situations in which they will have a temporary increase due to maintenance issues or the installation of new equipment, which cause discharges within existing capacity and pursuant to an approved operation within the context of their permit. Requiring permittees to obtain confirmation from IDEM to be sure they are not triggering antidegradation review in such cases would be unduly burdensome for both the agency and the permittee. Similarly, there may be cases in which a permittee may have other types of short term, emergency use needs. We suggest that the Antidegradation Rules contain a provision to clearly address this issue,

NPDES permits are not issued unless the proposed discharge is treated with appropriate technology and complies with water quality standards. However, the Antidegradation Rules go beyond assuring that the discharges are safe by requiring review of changes in water quality that may result from increased or new discharges, even though those changes would not cause any violation of water quality standards.

Antidegradation review imposes significant additional costs on the regulated community and ultimately on their customers. Those costs are principally the additional time and expense involved in complying with the antidegradation requirements. Where the effect of a new or increased discharge on the environment is insignificant (*i.e.*, is less than the de minimis threshold), there is no benefit to requiring this commitment of time and money by the public, the regulated community, and government agencies. Requiring extensive review of insignificant or inconsequential discharges that clearly will remain below the water quality standards is punitive to industry without offering any meaningful added protection to human health or the environment.

Senate Enrolled Act 431 (P.L. 140-2000) ("SEA 431") requires the Board to adopt a rule for outstanding state resource waters ("OSRWs") that includes a de minimis quantity of additional pollutant load for which a new or increased permit limit is required and below which antidegradation procedures do not apply. This de minimis concept should be extended to all high quality waters.

SEA 431 addressed, among other things, antidegradation implementation procedures for OSRWs. In particular, it amended IC § 13-18-3-2 to require the Board to adopt antidegradation implementation procedures that include the following:

> (m)...(1) A definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load;
>
> (A) for which a new or increased permit is required; and
>
> (B) below which antidegradation implementation procedures do not apply.

See SEA 431, Section 17, codified at IC § 13-18-3-2-(m)(1).

This language unambiguously requires a de minimis level for OSRWs. This de minimis level is triggered when a discharger needs a new or increased permit limit. If the new or increased discharge is below the de minimis level, the antidegradation implementation procedures do not apply to the discharge. Although the provisions of SEA 431 do not expressly apply to high quality waters that are not designated as OSRWs, it only makes sense to extend the de minimis concept in SEA 431 to all high quality waters. Otherwise, the antidegradation implementation procedures for regular high quality waters would be more stringent than the requirements for OSRWs.

9. The Scope of the Comments in the Petition for Corrective Action is Not Appropriate for this Rulemaking.

The environmental groups' comments and challenges set forth in their Petition for Corrective Action merit little or no consideration. However, the IWQC and IMA submit the following comments to *some* of the environmental groups' claims.

First, the IWQC and IMA agree that some of the amendments to the Antidegradation Rules conflict with existing case law and are not consistent with 40 CFR § 131.12, but not the amendments which are the focus of the environmental group's Petition for Corrective Action. As explained previously, the Antidegradation Rules should be narrowed in scope to apply only to NPDES permittees, certain broad definitions should be amended or eliminated from the rules to allow regulated persons to easily and definitively understand which substances are regulated under the rules, and the rules should be simplified for ease of comprehension and enforcement. But the environmental groups' challenges go too far, suggesting that every substance that could in any way affect the assimilative capacity of receiving waters[44/] should be policed by an over-burdened agency with limited available resources. Likewise, the environmental groups' attempt to fold into an antidegradation regime the regulation of nutrients and

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44/ Petition for Corrective Action, p. 5.

sediments from nonpoint source discharges[45/] is inappropriate since the antidegradation rules are only aimed at point source discharges subject to NDPES permitting.

The environmental groups also take aim at the exceptions for *de minimis* discharges, believing them unacceptable and inappropriate, especially in light of EPA Region 8's disapproval of Utah's antidegradation rules.[46/] Curiously, EPA Region 8 began its analysis by noting that the *de minimis* issue was considered at length in developing the water quality guidance and requirements for the Great Lakes:

> Relying on input offered during the four year open public process involving environmental groups, industry representatives, and other experts, with numerous opportunities for public input, the directors of the eight Great Lakes states and EPA technical experts reached a consensus on a significance threshold value of ten percent of the available assimilative capacity, coupled with a cumulative cap. They determined that this threshold represented a reasonable balance between the need to limit the number of detailed antidegradation reviews and the need to maintain and protect high quality waters. They reached a consensus that any individual decision resulting in less than a ten percent loss of assimilative capacity represents minimal risk to the receiving water, and exempting such proposals from antidegradation review is fully consistent with the objectives and goals of the Clean Water Act.

EPA Actions on Revisions to Utah's Water Quality Standards, Region 8, September 30, 2009, p. 13.

Region 8 based its narrow interpretation of the legality of *de minimis* exceptions upon *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008). The court in *Kentucky Waterways* was focused on the narrow language of the law,[47/] rather than on a common sense interpretation of the federal antidegradation regulations, as

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45/ Petition for Corrective Action, p. 6.

46/ Petition for Corrective Action, p. 7, n. 10.

47/ The court began its analysis by noting that that "The text of 40 C.F.R. § 131.12(a)(2) does not provide for any exceptions to Tier II review based on the type or quantity of new sources of pollution." *Kentucky Waterways*, 540 F.3d at 483. However, it appears the parties did not argue, and the court did not consider, the more narrowed focus of 40 CFR § 131.11(a)(1), which mandates that States must adopt those water quality criteria that contain "*sufficient* parameters or constituents to protect the designated use." Clearly, by including the word "sufficient," it meant that States did not have to require antidegradation demonstrations for each and every possible pollutant.

exemplified by the detailed analysis and conclusions that resulted in the Great Lakes System *de minimis* exceptions and the Supreme Court case law on "absurd results" and "administrative necessity." (No where in the *Kentucky Waterways* opinion did the underlying parties argue to the court the application of the doctrines of "absurd results" or "administrative necessity.") Further, to say that no authority exists to suggest a 25% reduction in water quality could be considered insignificant,[48/] fails to take into account Wisconsin's *de minimis* exceptions, which were approved by EPA Region 5.

EPA has interpreted its regulation governing high quality waters to authorize states to allow a *de minimis* amount of lowering of water quality without triggering Tier 2 review. In its 1998 ANPRM, EPA stated that "Where the degradation is not significant, the antidegradation review is typically terminated for that proposed activity," and that "applying antidegradation requirements only to activities that will result in a significant degradation is a useful approach that allows States ... to focus limited resources where they may result in the greatest environmental protection." 63 Fed. Reg. 36742, 36783; *Ovec v. Whitman*, 279 F.Supp.2d 732, 769 (S.D.W.V. 2004)(concluding that EPA's regulation does not preclude a state from permitting some *de minimis* amount of pollution before imposing Tier 2 review.) Additionally, following the environmental group's argument would result in antidegradation being a "no growth" rule, which it "was never designed or intended to be such. [Instead] it is a policy that allows public decisions to be made on important environmental actions." EPA's Water Quality Handbook, Ch. 4, Section 4.5; SID, p. 203, Ch. VII (A)(1).[49/]

Finally, the environmental groups contend that the Indiana Legislature has unlawfully limited IDEM's authority to implement the federal antidegradation regulations.[50/] It has not. Contrary to the environmental groups' beliefs, EPA's authority to approve *de minimis* exceptions is not as limited as described in *Kentucky Waterways*, where the parties did not argue the concepts of absurd results and administrative necessity. Further, the implementation of *de minimis* exceptions originated not with House Enrolled Act 1162 (P.L. 78-2009), but with Senate Enrolled Act 431 (P.L. 140-2000), which the environmental groups have not mentioned. Finally, the requirement that the Commissioner give substantial weight to any applicable determinations by governmental entities[51/] concerning economic and any other impact analysis merely affords deference to the particular expertise of the government entities that focus their

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48/ Petition for Corrective Action, p. 7.

49/ "The protection of high quality waters under antidegradation causes considerable confusion and controversy. It is often interpreted incorrectly as an absolute prohibition on lowering of water quality in high quality waters. Such a prohibition would amount to a 'no growth' policy which is not consistent with EPA's position as expressed in the regulations."

50/ Petition for Corrective Action, pp. 8-9.

51/ I.C. § 13-18-3-2(t)(1), as amended by P.L. 78-2009, Section 15.

energy and resources on economic development. It does not usurp the Commissioner's ultimate decision-making authority.[52/]

10. The Definition of an "Outstanding National Resource Water," at I.C. § 13-11-2-149.5, Should be Amended to be Consistent with P.L. 78-2009, Section 5.

The definition of an "outstanding national resource water," at I.C. § 13-11-2-149.5 is not consistent with House Enrolled Act 1162 (P.L. 78-2009), Section 5, which defines "outstanding national resource water" for purposes of section 50.5 and IC 13-18-3. Specifically, P.L. 78-2009, Section 5 stated that an "'outstanding national resource water' means a water designated as such by the general assembly after recommendations by the water pollution control board and the environmental quality service council under IC 13-18-3-2(n) and IC 13-18-3-2(o)...," and striking I.C. § 13-18-3-2(p). Instead, the Antidegradation Rules at 327 IAC 2-1.3-2(35)[53/] define "outstanding national resource water" with references IC 13-18-3-2(o) and IC13-18-3-2(p). The definition of "outstanding national resource water" fails to include I.C. § 13-18-3-2(n) and wrongly includes I.C. § 13-18-3-2(p).

11. The word "value" following the "water quality criterion" should be removed because the word is undefined and meaningless.

Throughout 327 IAC 2-1.3, the word "value" follows the term "water quality criteria" or "water quality criterion." The word "value" is vague, meaningless, and will lead to confusion. The term should be removed.

12. The IWQC and IMA Believe That Several Decisions Made by IDEM in the Antidegradation Rules Can be Supported, But Several Sections in the Rules Need to be Changed or Deleted.

In addition to the comments above, the IWQC and IMA have several miscellaneous comments that need considered or addressed. The comments are arranged in the sequence of the Indiana Register Notice and do represent the priorities or the importance of how comments should be addressed.

A. RESPONSE TO COMMENTS ISSUES

i. The IWQC and IMA support IDEM's response to comments that projects which require air pollution control technology that generate wastewater under the Clean Air Act and groundwater remediation projects are activities that should not be required to undergo a full antidegradation

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52/ I.C. § 13-18-3-2(s).

53/ Antidegradation Rules, p. 26.

review with a detailed demonstration of necessity and socio-economic benefit.[54/] The IWQC and IMA support IDEM efforts to reduce the burden for situations that are clearly a beneficial to a community or the environment.

ii. The IWQC and IMA do not support IDEM's response to comments that an antidegradation demonstration is required when a new 316(a) variance is granted to a discharger.[55/] CWA 316(a) variances are simply not subject to antidegradation review under the law. The Antidegradation Rules must, as a matter of law, recognize that CWA § 316(a) takes precedence over antidegradation review. IDEM's response to comment incorrectly states that "The 316(a) variance does not include a review of alternatives that would eliminate or reduce the need or the effluent limits that exceed the WQBELs for temperature."[56/]

The *Water Quality Standards Handbook,* Second Edition, Chapter 4.2, states as follows:

> The requirement for potential water quality impairment associated with thermal discharges contained in section 131.12(a)(4) of the regulation is intended to coordinate the requirements and procedures of the antidegradation policy with those established in the Act for setting thermal discharge limitations. Regulations implementing section 316 may be found at 40 CFR 124.66. ***The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act.***

Further, 33 U.S.C. § 1326(a) provides:

> **(a) Effluent limitations that will assure protection and propagation of balanced, indigenous population of shellfish, fish, and wildlife.** With respect to any point source otherwise subject to the provisions of section 1311 of this title or section 1316 of this title, whenever the owner or operator of any such source, after opportunity for

54/ Antidegradation Rules, p. 5.

55/ Antidegradation Rules, p. 6.

56/ Antidegradation Rules, p. 6.

> public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

iii. The IWQC and IMA support IDEM's decision response to comments that the calculation of "total loading capacity" be established at the time of request to include any additional proposed effluent flow.[57/] The IWQC and IMA believe that IDEM is correct in including the proposed flow of an increase in discharge for both municipal and industrial facilities in the calculation of total loading capacity.

iv. The IWQC and IMA do not support IDEM's decision to lower the threshold for what is a de minimis lowering of water quality" for OSRWs.[58/] IDEM should make the threshold de minimis lowering of water quality at least 10% of the unused loading capacity.

v. The Antidegradation Rules should provide some criteria for justifying exemptions. In the response to comments, IDEM that the draft rule has a finite list of exemptions and the discharger is required to justify claiming an exemption.[59]

57/ Antidegradation Rules, p. 9.

58/ Antidegradation Rules, p. 10.

59/ Antidegradation Rules, p. 13.

B. DRAFT RULE COMMENTS

i. 327 IAC 2-1.3-(1)(c) should be deleted from the Antidegradation Rules.[60] As noted in the summary/response from the first comment period, "All existing Indiana-issued general permits by rule will be evaluated for compliance with antidegradation standards as required by P.L. 78-2009 (House Enrolled Act 1162, 2009 General Assembly regular session.)"[61] In essence, the rules for general permits have to undergo antidegradation review, not each general permit.

ii. 327 IAC 2-1.3-2(1) should add language that clarifies that a significant lowering of water quality must be based on an increase in concentration of a pollutant followed by an increase in pollutant loading.[62] As written, the definition of "Antidegradation demonstration application" is inconsistent with the definition of "Significant lowering of water quality" in 327 IAC 2-1.3-2(55)[63].

iii. The definition of "Application" in 327 IAC 2-1.3-2(2)(B) is too broad in including a "determination" related to a permit.[64] Only determinations made for requests for a new or increased pollutant loading that causes an increase of a pollutant in the environment should be included in this definition. There are many determinations that IDEM can make on an NPDES permit that covers many non-numeric permit increase limit issues.

iv. The *E. coli* limits in the definition of "Best available demonstrated control technology" (BADCT) in 327 IAC 2-1.3-2(3)(A)(v) should be deleted.[65] These values are water quality based limits, not technology based limits. Furthermore, as written, these limits appear to require year-round disinfection, which could lead to a 71% increase in operating costs of disinfection systems. *The additional cost for year round disinfection using UV light is estimated to be $752,719 (5 out 12 months) for all 465 public owned treatment facility using average costs provided in the table below to meet this BDCAT limitation.*

60/ Antidegradation Rules, p. 22.

61/ Antidegradation Rules, p. 7.

62/ Antidegradation Rules, p. 22.

63/ Antidegradation Rules, p. 28.

64/ Antidegradation Rules, pp. 22-23.

65/ Antidegradation Rules, p. 23.

Cost Category	Large Scale UV Average Cost/unit	Small Scale UV Average Cost/unit	Average Cost
Energy	$3300	$35-40	$1668.75
Lamps and Chemicals	$2840	$75-80	$1458.75
Cleaning	$1180		
Maintenance	$1440	$50-100	$757.50
Process control/Labor	$6240		
Testing	$4160		
Total			$3,885.00

Sources: U.S. EPA "Wastewater Technology Fact Sheet Ultraviolet Disinfection," EPA 832-F-99-064, September 1999; U.S. EPA "Onsite Wastewater Treatment Systems Technology Fact Sheet 4, Effluent Disinfection Processes"

Dechlorination tablets	$30-50
Labor	$75-100
Misc. repairs & replacements	$15-25
Analytical support/testing	Not estimated

Operation and maintenance would consist of tablets ($30 to $50 per year), labor ($75 to $100 per year), and miscellaneous repairs and replacements ($15 to $25 per year), in addition to any analytical support required. Installed costs of UV units and associated facilities are $1,000 to $2,000. O/M costs include power ($35 to $40 per year), semiskilled labor ($50 to $100 per year), and lamp replacement ($70 to $80 per year), plus any analytical support.

v. 327 IAC 2-1.3-2(3)(B) should be deleted from the rule.[66/] This language provides no relevant requirements as effluent limitations are developed on a case-by-case basis.

vi. 327 IAC 2-1.3-2(3)(C) should modified to state that a direct discharger subject to categorical guidelines should meet applicable best conventional pollution control technology (BCT), best available technology economically achievable (BAT), best practicable control technology currently available (BPT) or new source performance standards (NSPS).[67/] This change is required because IDEM cannot substantiate that "existing source" discharges can cost-effectively automatically upgrade treatment systems to meet "new source" technology based limitations. For example, in Indiana there are three electrical generating facilities that operate fly ash pond systems that are required to meet BPT, BCT and BAT limitations. If all three of these facilities became subject to a new requirement or made a change that would require an antidegradation demonstration review, the current definition of "Best available

66/ Antidegradation Rules, p. 23.

67/ Antidegradation Rules, p. 23.

demonstrated control technology" (BADCT) would require each of these facilities to convert a wet fly ash pond to a dry system with a landfill. The estimated cost deferential capital costs and annual operating and maintenance costs for these three facilities to upgrade from BAT to NSPS could be as much as $90 million and $84 million, respectively. These costs represent the comparative cost of raising a dam to maintain a wet system and expenses of piping.

The above figures are based on one company's analysis of converting a system in West Virginia. An EPA database shows 7 Indiana companies (6 utilities and Alcoa) have 53 ash ponds. The number of ponds is somewhat misleading, for example, one company is listed as having one bottom ash and three fly ash ponds, when the fly ash ponds are actually one large impoundment with three interconnected basins. Nonetheless, there are many fly ash ponds in Indiana. One company obtained a cost estimate to covert from fly ash ponds to a landfill. The cost of conversion was estimated to be $35 million (converting to dry fly ash handling and building Phase I of a landfill). This does not include the costs for closing out the fly ash ponds or doing anything to the bottom of the fly ash ponds. It also does not include the estimated cost ($80 million) for a new wastewater treatment facility to treat other wastewaters currently going to the fly ash ponds.

vii. IDEM should not include the term "narrative statements" in the definition of "criterion" in 327 IAC 2-1.3-2(14).[68] Narrative statements are generally subjective conditions (odor or color that produces a nuisance) that have not been explicitly defined and do not lend themselves to the pollutant-by-pollutant antidegradation analyses stated in the rules.

viii. The definition of "Designated uses" in 327 IAC 2-1.3-2(17) should better reflect uses such as drinking water, recreation, warm water aquatic life.[69] One option would be to include a cross-reference in the definition other rules that already define uses in 327 IAC 2-1-3.

ix. Language in 327IAC 2-1.3-2(19) is potentially conflicting and needs to be clarified regarding terminating permits.[70] The definition of "Draft permit" states the following: "A notice of intent to terminate a permit and a notice of intent to deny a permit are types of draft permits. A denial of a request for modification, revocation, and reissuance, or termination is

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68/ Antidegradation Rules, p. 24.

69/ Antidegradation Rules, p. 24.

70/ Antidegradation Rules, p. 24.

not a draft permit. A proposed permit is not a draft permit." It is unclear whether permit terminations are draft permits.

x. The definition of "Outstanding national resource water" (ONRW) in 327 IAC 2-1.3-2 (35)(C) creates an unclear boundary of where this special designation applies.[71] It is appears that the language in the definition can unknowingly add any water to an ONRW, if it is "reasonably necessary for the protection of other waterbodies designated as ONRWs." It is also unclear as to whether this language follows Indiana statutory considerations regarding the designation of ONRWs.

xi. The definition in 327 IAC 2-1.3-2(38) for a "permit" should be clarified.[72] The proposed language defines a "permit" as a "permit" in 2-1.3-2(38)(A). IDEM should consider whether a definition used in 327 IAC 5-1.5-39 should considered.

xii. In 327 IAC 2-1.3-4(b)(1)(B)(i), IDEM should reinstate a 10% unused loading capacity (or higher) threshold for determining what a "significant lowering of water quality" is for High Quality Waters (HQWs) that are Outstanding State Resource Waters (OSRWs).[73] IDEM should use the definition of "Final acute value" in 327 IAC 2-1.3-2(23)(A) and (B)[74] to scientifically defend a 10% (or higher) unused loading capacity for all waters and lend credibility to its decisions that its process will protect water quality and not incrementally allow deterioration of water quality. This type of information will stop the belief that the credibility of a State's antidegradation implementation procedures is strained and the environment and drinking water supplies are not maintained. Given IDEM's approach, it would be logical and practical to assume that use of 10% unused loading capacity protects most likely 99.5% of species, and that use of 33% unused loading capacity (like Wisconsin) would most likely protect 98.3% of species. Arbitrarily assuming 10% of something being "significant" has no meaning unless it can be directly tied to a tangible outcome (99.5% or species are protected). IDEM should also adjust any benchmark unused loading capacity values in 327 IAC 2-1.3-4(b)(1)(A)(i)(DD) and (b)(1)(B)(i)(DD)[75] to higher levels (i.e. 50% of the

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71/ Antidegradation Rules, p. 26.

72/ Antidegradation Rules, p. 26.

73/ Antidegradation Rules, p. 32.

74/ Antidegradation Rules, p. 24.

75/ Antidegradation Rules, p. 32.

unused loading capacity, which provides the estimated number of species protected to be at 97.5% or more). This analysis also includes 7Q10 low flow values, which with other inherent safety factors built into the analysis, likely severely underestimates the protection afforded.

xiii. The IWQC and IMA support 327 IAC 2-1.3-4(b)(3)(F) which exempts a new or increased loading of an approved non-BCC water treatment additives.[76/] Given the exact language in 327 IAC 3-1.3-4(b)(3)(F), the IWQC and IMA would like to clarify that dischargers are still eligible to change water treatment additives as long as they are approved under the conditions of an NPDES permit (i.e. prior approval by IDEM) conditions.

xiv. The IWQC and IMA request that "exemptions" that are not a "significant lowering of water quality" not be submitted to IDEM for approval. The IWQC and IMA are fundamentally opposed to activities that are not a "significant lowering of water quality" to be approved by IDEM.

xv. The IWQC and IMA support 327 IAC 2-1.3-5(a)(2) that exemption justifications (only if required – see Comment 6 above) be submitted with a new, renewed, or modified NPDES permit.[77/] The IWQC and IMA would like further clarification how exemptions that do not require a permit application submission are to be managed.

xvi. IDEM needs to ensure that decisions on the pollution prevention alternatives and technology assessment by the Commissioner be based options that are identified that are comparable in cost to baseline treatment costs.[78/] In 327 IAC 2-1.3-7(c)(1), the Commissioner can deny an approval based on "cost-effective" measures being available to a discharger. While the objective of pollution prevention and alternative or enhanced treatment analyses are to ensure that the actual degradation of the high quality water is reduced to the greatest extent practicable, to be consistent with the SID, *IDEM should not just consider cost-effective measures, but should also consider treatment options that are identified that are comparable in cost to "baseline treatment costs."* It is extremely important for IDEM do this for general permits. IDEM needs to consider and summarize how industry sectors have been through technology evaluations to reduce the further assumptions regarding decisions about applicable technologies. This is very important for operations such as coal mines, which have been through many of these evaluations and are

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76/ Antidegradation Rules, p. 34.

77/ Antidegradation Rules, p. 35.

78/ Antidegradation Rules, p. 38.

socially and economically important to local communities and the national infrastructure. If IDEM does not properly do this industry sector, IDEM could trigger antidegradation demonstrations for individual drainage basins under each permit. Typically mining permits have 10 - 20 basins over the life of the mine. The estimated cost to assess the engineering designs and treatment performance alternatives around an individual basin has been estimated to be $50,000. This could add costs of $500,000 to $1,000,000 per mine if individual basins and "baseline treatment costs" are not rationally managed and exempted from demonstrations.

As an example of the general permit rationale, an evaluation of 327 IAC 15-10 should find that general permits for "Ground Water Petroleum Remediation Systems" because IDEM oversaw the applicable technology basis for the limitations in the rule. The general permit for these types of discharges imposes monitoring requirements and numeric effluent limitations designed to protect water quality. In addition, these discharges only occur during the period of time necessary to complete the remediation process, and these projects ensure that public health and the environment is not threatened, and clean up ground water for future safe use. For example, this permit requires benzene of 5 ug/L. This limit is based on technology for meeting a at the tap drinking water standard and is almost 20 times lower than the secondary continuous concentration of 98 ug/L calculated by IDEM that protects aquatic life for chronic effects.

xvii. IDEM needs to ensure that decisions on the pollution prevention alternatives and technology assessment by the Commissioner be based on options that are identified that are comparable in cost to baseline treatment costs. In 327 IAC 2-1.3-7(c)(1)[79], the Commissioner can deny an approval based on "cost-effective" measures being available to a discharger. While we all understand that the objective of pollution prevention and alternative or enhanced treatment analyses are to ensure that the actual degradation of the high quality water is reduced to the greatest extent practicable. To be consistent with the SID for the Great Lakes Initiative, *IDEM should not just consider cost-effective measures, but should also consider treatment options that are identified that are comparable in cost to "baseline treatment costs."* For example, an evaluation of a treatment alternative requirement for limits for coal mining discharges to be met from the time the discharge caused by a precipitation event begins and will continuing from 48 hours to 72 hours after a precipitation event has ceased will significantly increase capital and operating costs at coal mining facilities. In this situation, 51 or more coal mining NPDES permits that could be affected by this decision.

79/ Antidegradation Rules, p. 38.

Current federally required BAT technology, the "baseline treatment cost," for coal mining discharges allows operations to meet limits from the time the discharge caused by a precipitation event begins and will continue to apply until 48 hours after the precipitation event. In order meet the higher level of control, all of the discharges in these permits (approximately 400) would have to upgrade to a level of treatment that U.S. EPA found to be not economically achievable on a national basis. Based on the "Development Document for Effluent Limitations and Standards for the Coal Mining Point Source Category" (EPA, EPA 440/1-82/057, October 1982), all of these discharges would have to upgrade their technology to incorporate neutralization, aeration, and settling to include flocculant addition technology. U.S. EPA indicated in the development document that the installation of flocculant technology for each discharge would cost between $30,000 and $40,000 per discharge in capital costs. Additional operating costs were estimated to be from $0.42/1000 gallons to $0.41/1000 gallons. *Given these assumptions, this new level of treatment new requirement would require a total of capital costs ranging from $12,000,000 to $16,000,000 and would require hundreds of thousands more dollars in annual operating costs.* IDEM should further consider and summarize how many other industry sectors have been through technology evaluations to reduce the further assumptions regarding decisions about technology.

13. IWQC and IMA Support the Case Examples of IEA.

The IWQC and IMA support the case examples submitted by IEA and other IMA members in their comments to the Antidegradation Rules.

14. IWQC and IMA Will Submit Additional Information on Fiscal Impact.

The IWQC and IMA will submit additional information to IDEM, OMB, and/or others, as may be appropriate, to support the fiscal impact analysis as more information becomes available. The IWQC and IMA believe that the Antidegradation Rules will have significant fiscal impact on regulated entities.

III. CONCLUSION

The IWQC and IMA appreciate the opportunity to provide these comments. As demonstrated above, the Antidegradation Rules should be revised to comply with the rulemaking requirements under I.C. § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, avoiding duplication of existing standards in other state and federal laws, ease of comprehension, and allowing for practical enforcement. Incorporating the IWQC and IMA's comments and suggestions set forth above will allow the Antidegradation Rules to meet these requirements.

Again, if you have any questions or comments, please contact me at wwagner@taftlaw.com or at (317) 713-3614.

Sincerely,

/ s / William C. Wagner

William C. Wagner

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